

1 was, "The Parties do not challenge the Commission's stated
2 justification for rescinding Capitol's authority to operate
3 Station WNSX-646." And by that I mean, "stated justifica-
4 tion," was the paragraphs setting forth the allegation, namely
5 the paragraphs following the Commission's -- and what I mean
6 there, what I mean there, in the Commission's discussion they
7 discuss the grounds for setting this matter for hearing, the
8 revocation proceeding for hearing, and that's what I mean by
9 the "justification for rescinding Capitol's authority". I'm
10 not talking about the procedural matter. I'm talking about
11 the substantive justification.

12 MR. HARDMAN: All right.

13 JUDGE CHACHKIN: And the substantive justification
14 is set forth fully in the Commission's discussion.

15 MR. HARDMAN: Well, certainly we --

16 JUDGE CHACHKIN: And you certainly didn't challenge
17 it. You didn't discuss it --

18 MR. HARDMAN: Well, not, not --

19 JUDGE CHACHKIN: -- at all in the --

20 MR. HARDMAN: -- not --

21 JUDGE CHACHKIN: -- Motion to -- and I'm referring
22 to your Motion to Delete Issues.

23 MR. HARDMAN: I --

24 JUDGE CHACHKIN: There was no statement in the
25 Motion to Delete Issues that the Commission was wrong in

1 setting this matter for hearing in the first place. Your only
2 contention was that it should have been part of a revocation
3 rather than be treated as a new application.

4 MR. HARDMAN: Oh, it certainly would be an idle
5 act --

6 JUDGE CHACHKIN: So, you misunderstood what I said
7 there in my footnote.

8 MR. HARDMAN: Okay. That that was point number one,
9 but it certainly would be an idle act to say at this juncture
10 that the Commission was not justified in setting it for hear-
11 ing, because that is certainly our position. But the point is
12 that procedurally what is before the Commission is a valid
13 license because the Petition for Reconsideration was in fact
14 withdrawn, which is a self-executing act except when the
15 Commission Rules require permission to withdraw a petition and
16 furnishing of information such as no consideration or detail-
17 ing what the consideration is.

18 JUDGE CHACHKIN: Are you saying -- are you, are you
19 saying that the filing of a Petition to Withdraw automatically
20 vests whether the Commission acts on it or not?

21 MR. HARDMAN: I'm saying that in a proceeding in
22 which there is no requirement to obtain permission to withdraw
23 a pleading, a Petition for Reconsideration which is
24 voluntarily --

25 JUDGE CHACHKIN: Well, who says there's no

1 requirement?

2 MR. HARDMAN: There is no --

3 JUDGE CHACHKIN: Who says, who --

4 MR. HARDMAN: -- requirement in the --

5 JUDGE CHACHKIN: -- says the Commission can't deny a
6 Petition to Dismiss?

7 MR. HARDMAN: It's not a Petition to Dismiss. It is
8 a voluntary dismissal. It is not a request to act and the
9 Commission has no rule requiring taking leave or seeking leave
10 to dismiss this type of petition. In other cases, in Broad-
11 casting, in Cellular, it does, but in this type of proceeding
12 it does not. That makes the, the voluntary dismissal self-
13 executing. The Commission never acts on such Requests for
14 Dismissal. There is never any sort of acknowledgement or
15 formal action taken on those types of, of requests. And, in
16 fact, that was the practice here. It was, it was done.
17 Everyone proceeded on that basis, which made the grant of the
18 license final and subject to a 312 proceeding but not a uni-
19 lateral set-aside of the license grant.

20 JUDGE CHACHKIN: Well, even assuming for the sake of
21 argument your position is correct, I have no authority to
22 reconsider the Commission's Designation Order. As I cited
23 the, the cases, I made clear I have no such authority. And --

24 MR. HARDMAN: Well, it's --

25 JUDGE CHACHKIN: We're obviously much too late for

1 | you to ask me to take it -- the matter to the Commi-- certify
2 | the matter to the Commission. That should have been done a
3 | long time ago. You never filed such a motion, so there was
4 | nothing for me to act on. And also, as I pointed out specifi-
5 | cally, Section 1.106(a)(1) provides that a Petition for Recon-
6 | sideration of an Order Designating a Case for Hearing will be
7 | entertained by the Commission only if it relates to an adverse
8 | resolution with respect to petitioner's participation in the
9 | proceeding. So, there's nothing I could do about it. I can't
10 | grant a reconsideration, nor will I. I made clear as my first
11 | basis for it that I was precluded from reconsidering the
12 | Commission's Order. I'm even precluded under Yemm from recon-
13 | sidering a designation issue or order issued by the Staff.
14 | I'm certainly precluded from reconsidering a designation order
15 | issued by the Commission.

16 | MR. HARDMAN: Well, we appreciate the novelty of the
17 | question presented here. We attempted our best to find a way
18 | to resolve it under the, under the Commission's Rules.
19 | Clearly, there was a mistake made here in the, in the
20 | Designation Order because the, the, the Petition for Reconsid-
21 | eration had in fact been dismissed. Now, what more we can do
22 | at this point in terms of trying to find a way to get the
23 | issues specified correctly, obviously we have -- you know, we
24 | have to take another look at it to see if there are, are other
25 | options in, in light of your Order.

1 JUDGE CHACHKIN: Well, all I'm saying that if you
2 file a Petition for Reconsideration I will just deny it on the
3 grounds that I've already considered these matters and that
4 the Rules do not permit reconsideration of, of Judge's orders.
5 So, I don't know what other avenue you're going to try, but
6 I've indicated where my res-- where my authority ends --
7 begins and ends.

8 All right. Any, any, anything else you want to
9 bring up this morning, Mr. Hardman?

10 MR. HARDMAN: Not at this time, Your Honor.

11 MR. JOYCE: Your Honor, if I may just --

12 JUDGE CHACHKIN: Yes.

13 MR. JOYCE: Another procedural matter. We have --
14 counsel for Capitol and counsel for RAM have agreed to a
15 Stipulation and Protective Order. We have not filed it yet.
16 The FCC may not be consenting to it for a variety of reasons,
17 including FOIA concerns. I just want to be sure that, that
18 would be appropriate to file that with the -- with you.

19 JUDGE CHACHKIN: What kind of protective order are
20 you talking about?

21 MR. JOYCE: Well, in regard to we're anticipating
22 that there might be commercially sensitive information that
23 would be disclosed during discovery.

24 JUDGE CHACHKIN: And you mean you want to make sure
25 that it's not revealed to third parties? Is that --

1 MR. JOYCE: Exactly.

2 JUDGE CHACHKIN: Oh. You're right. You, you -- it
3 would be proper to file it with me. And anything the Parties
4 want to stipulate to of that nature, I certainly would have no
5 objection to it.

6 MR. JOYCE: Thank you, Your Honor.

7 JUDGE CHACHKIN: All I want is it in writing, but I,
8 I will have no objection to something the Parties stipulate to
9 along that nature. With the understanding, of course, that if
10 it's necessary for hearing, for the Parties to use it at the
11 hearing, of course, obviously there will be no protection
12 under tho-- un-- in that -- if no other way could be found to,
13 to put the evidence in, obviously the evidence would have to
14 come in.

15 MR. JOYCE: Yes. We're, we're expecting that the,
16 the Parties to the hearing will sign off on the consent decree
17 so that they individually will agree not to disclose that
18 information to third parties.

19 JUDGE CHACHKIN: Well, the, the, the only question I
20 have is how will that evidence come into the hearing record?

21 MR. JOYCE: We would submit it to you labelled as
22 "confidential" and ask that you hold it sealed in an envelope
23 marked "confidential."

24 JUDGE CHACHKIN: Well, I'll have to wait and see
25 what the Parties have in mind. As far as discovery of course,

1 | though, the Parties certainly are free to enter into some kind
2 | of protection. And when it comes to the hearing, I'll rule on
3 | the matter when it comes up.

4 | MR. JOYCE: I understand. Thank you, Your Honor.

5 | JUDGE CHACHKIN: Anything else you want -- the
6 | Parties want to bring up at this point?

7 | All right, Mr. Borkowski. You're going to file some
8 | briefs for me, you say? You want to file a brief? Anyone
9 | else is free to file a brief too and --

10 | MR. BORKOWSKI: Yes, Your Honor. For it to be
11 | useful to you, when should it be filed by?

12 | JUDGE CHACHKIN: Well, I'd like to have it within
13 | the next -- certainly by -- how m-- how many days will it take
14 | you to prepare this brief? Let me ask you that?

15 | MR. BORKOWSKI: I'd, I'd like until at least the
16 | middle of next week, if I may.

17 | JUDGE CHACHKIN: All right. You can file it by next
18 | Friday then.

19 | MR. BORKOWSKI: Thank you, Your Honor.

20 | JUDGE CHACHKIN: Anyone else could file a brief if
21 | they wish, if they wish to go along with this position. But
22 | as far as I'm concerned, as of today we will have a hearing
23 | and discovery -- the Parties have -- at least today we've
24 | discussed discovery. Well, we have no other dates. We have
25 | just a hearing date of February 1st, but we have no other

1 | dates we, we've reached. Let's go off the record. Date for
2 | exchanging exhibits.

3 | (Off the record.)

4 | (On the record.)

5 | JUDGE CHACHKIN: The following pre-- procedural
6 | schedule has been established:

7 | Discovery will be completed by January 4, 1984.
8 | Exchange of exhibits will take place on January 18, 1994.
9 | Witness notification will take place on January 25, 198--
10 | 1994.

11 | In this regard, the Parties can orally notify each
12 | of the other Parties as to which witnesses they want and
13 | confirm it in writing with a copy to me. If there are any
14 | objections to any of the witnesses being called, the Parties
15 | should submit something in writing to me within two or three
16 | days after the notification has taken place and I will rule on
17 | the matter as quickly as I can.

18 | And the hearing is scheduled to commence on February
19 | 1, 198-- 1994, at 10 a.m. in the Commission's Washington,
20 | D. C., offices.

21 | One other thing I should discuss is that we do have
22 | here a situation in which we have one application and, and the
23 | rest of it involves revocations. Now, have there been any
24 | discussions of the Parties as to who's going to go forward
25 | with the issues?

1 MR. HARDMAN: If, if Your Honor would please, this,
2 this really gets to the core of why we filed a motion on the,
3 on the Petition for Reconsideration, because the, the way the
4 Hearing Designation Order is set out, since Capitol's applica-
5 tion purports to be remain pending, Capitol would have the
6 burden on that application, whereas in the revocation it's the
7 Government's burden. And if in fact, as we submit, the, the
8 license was perfected so that all matters would be in the
9 revocation side, the Government would have the burden in all
10 respects.

11 JUDGE CHACHKIN: Paragraph 30 specifically says that
12 you have the burden of proof and the burden of proceeding with
13 respect to the application.

14 MR. HARDMAN: That's correct.

15 JUDGE CHACHKIN: And the Bureau has the burden of
16 procee-- burden with respect to all other matters in the
17 proceeding. The Bureau has the burden of proof and the burden
18 of proceeding with all -- respect to all other matters in this
19 proceeding.

20 However, you should also be -- realize, of course,
21 that what you requested did not merely involve a situation of
22 evidentiary burden. If I granted your relief, Capitol would
23 then have a license and be able to continue to operate during
24 the course of this proceeding. And apparently Mr. Joyce had
25 no objection to that.

1 MR. HARDMAN: Well, we had --

2 MR. JOYCE: If I might speak to that issue, Your
3 Honor? We did stipulate to this motion, but I do want to make
4 it clear that I think Ken Hardman's interpretation is open to
5 dispute. And, as a matter of fact, it's -- I've put in writ-
6 ing to the FCC and to Capitol's counsel that I thought it was
7 an open question as to whether or not my Petition for Recon-
8 sideration was still pending at the FCC.

9 JUDGE CHACHKIN: But nevertheless you were willing
10 to support it, notwithstanding that they would have a right to
11 continue operating.

12 MR. JOYCE: Under the -- with the understanding that
13 they would not cause interference to shared license opera-
14 tions. With that understanding I signed off on the
15 stipulation, Your Honor.

16 MR. HARDMAN: Well. Your Honor, let me, let me also
17 add that it is not an issue of Capitol continuing to operate
18 this facility. It has discontinued operation and will discon-
19 tinue it regardless of how the matter is characterized, you
20 know, in, in the proceeding.

21 JUDGE CHACHKIN: Well, obviously, Mr. Hardman, if
22 you want to avoid the burden of proceeding and proof, a simple
23 matter for you to -- available to you is dismiss your
24 application.

25 MR. HARDMAN: And that may well be the outcome of

1 this.

2 JUDGE CHACHKIN: And then the, the Bureau will then
3 have the burden of proceeding and the proof under the revoca-
4 tion proceeding.

5 MR. HARDMAN: That, that may well be the outcome in
6 light of the developments this morning. Up to this point it
7 was not an issue.

8 JUDGE CHACHKIN: There will still be the question of
9 the imposition of the forfeiture, however. That still will
10 remain.

11 MR. HARDMAN: Yes. Yes, Your Honor. We understand
12 that.

13 JUDGE CHACHKIN: But the way it stands now, Mr.
14 Hardman, you have the burden of proceeding and proof with
15 respect to the application, and apparently all the issues
16 involve the application, all the evidentiary issues.

17 MR. HARDMAN: I don't interpret it that way, Your
18 Honor.

19 JUDGE CHACHKIN: Well, which evidentiary issue
20 doesn't involve your application?

21 MR. HARDMAN: Well, the eviden--

22 JUDGE CHACHKIN: They all involve WNSX-646, do they
23 not?

24 MR. HARDMAN: But the, the revocation part and the,
25 the, the, the issues that you cited as justification for

1 refusing the, the consent agreement deal with operations under
2 a license as opposed to the application for the license. That
3 would fall under the revocation where the Government has the
4 burden.

5 JUDGE CHACHKIN: I don't, I don't quite understand
6 what you mean. The issues all deal -- what did you interpret
7 it to mean when it said burden of proceeding and proof? What,
8 what did you interpret? What evidentiary issues did you
9 intend to go forward on?

10 MR. HARDMAN: Well, wha-- whether our intent --
11 whether Capitol's intent in, in filing for the application was
12 to cause interference.

13 JUDGE CHACHKIN: Is there any specific issue under
14 -- I thought all -- don't all these issues concern Capitol's
15 operation?

16 MR. JOYCE: It, it's not perfectly clear, Your
17 Honor, but they're -- I mean --

18 JUDGE CHACHKIN: I believe they are.

19 MR. JOYCE: One issue is the strike application
20 issue.

21 JUDGE CHACHKIN: I understand. But there are no --
22 as far as I know, there are no issues concerning any of the
23 other -- any of the existing licenses, are there? All the
24 issues concern the activities of Capitol --

25 MR. JOYCE: That's correct.

1 JUDGE CHACHKIN: -- with, with respect to WNSX.

2 MR. JOYCE: That's correct. Under the Private
3 Carrier Paging License. That is --

4 JUDGE CHACHKIN: That's right.

5 MR. JOYCE: -- correct, Your Honor.

6 MR. BORKOWSKI: And possibly one or two licenses
7 that are associated with it.

8 JUDGE CHACHKIN: That's right.

9 MR. BORKOWSKI: Yes.

10 JUDGE CHACHKIN: So, your position was you weren't
11 going to -- didn't have to go forward on these issues?

12 MR. HARDMAN: My position is that the, in substance,
13 the only issue that we have the burden of going forward on is
14 the bona fide -- issues relating to the bona fides of the
15 application in the, in the first instance.

16 JUDGE CHACHKIN: Now, which issues are that, do you
17 consider the -- go to that?

18 MR. BORKOWSKI: Can I borrow your copy of the order?
19 It's at -- it's Issue M, I believe, Mr. Hardman is referring
20 to, Your Honor.

21 MR. HARDMAN: Yeah, that's what I was --

22 JUDGE CHACHKIN: M is a conclusive issue in light of
23 the findings under paragraphs (A) through (L). It's a collu-
24 sive issue. It's not an evidentiary issue. It was your
25 intention not to put any evidence in?

1 MR. HARDMAN: Our position is that we do not have
2 the burden of showing that we did not cause malicious
3 interference. It's hard to prove a negative.

4 JUDGE CHACHKIN: Well, paragraph (30) says what it
5 says. If you want to go forward, you run the risk of losing
6 your licenses, but that's up to you. As I say, the only way
7 that I see that you can avoid going forward is by dismissing
8 the application.

9 MR. HARDMAN: Thank you.

10 JUDGE CHACHKIN: What is the Bureau's position about
11 its responsibility?

12 MR. BORKOWSKI: Our responsibility is defined in
13 paragraph (30) as you pointed out, Your Honor, in terms of the
14 logistical methods of handling it, introducing evidence during
15 the course of the hearing. Counsel for all the Parties had
16 not made an effort to work that out and I expected it would be
17 the subject of the discussion that we're having right now,
18 Your Honor.

19 JUDGE CHACHKIN: Well, you're right in one respect,
20 Mr. Hardman, that all the issues concern that application.
21 However, your burden was only with respect to the -- your ap--
22 your pending application while the Bureau had the burden with
23 respect to question of revocation of all the other applica-
24 tions. So, there is some duplication here obviously, in terms
25 of going forward, and presumably the Parties may be able to

1 work that out. I don't know.

2 Anything else the Parties want to bring up this
3 morning? All right. We're in recess, then, until February 1,
4 198-- 1994.

5 MR. BORKOWSKI: Thank you, Your Honor.

6 MR. HARDMAN: Thank you.

7 (Whereupon, the Prehearing Conference adjourned at
8 10:00 a.m. on Friday, October 29, 1993.)
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CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER

IN THE MATTER OF CAPITOL RADIOTELEPHONE COMPANY, INC.

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PR DOCKET NO. 93-231

Docket No.

WASHINGTON, D.C.

Place

OCTOBER 29, 1993

Date

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 39, inclusive, are the true, accurate and complete transcript prepared from the reporting by BARBARA J. LORD in attendance at the above identified proceeding, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription Statement of Work and have verified the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the proceeding and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the proceeding.

November 5, 1993

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